JD–59–21
Hampden, ME

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

UNITED STATES POSTAL SERVICE

and CASE 01–CA–263580

AMERICAN POSTAL WORKERS UNION,
LOCAL 536, AFL-CIO

Meredith B. Garry, Esq. and *Emily G. Goldman, Esq.,*
for the General Counsel.
Dallas G. Kingsbury, Esq.,
for the Respondent.

DECISION

STATEMENT OF THE CASE

DONNA N. DAWSON, Administrative Law Judge. This case was tried virtually via Zoom for Government technology on June 8, 2021. The American Postal Workers Union (APWU), Local 536, AFL–CIO (the Local Union/Local 536) filed initial and amended charges on July 27 and November 24, 2020.[1] The General Counsel issued a complaint on February 11, 2021 alleging that Respondent, the United States Postal Service (USPS), violated Section 8(a)(1) and (5) of the Act when it failed and refused to provide the Union with information relevant and necessary to its representational duties.

On the entire record[2], including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent provides postal services for the United States and operates facilities throughout the United States in performing that function, including its facility known as the

[1] All dates are 2020 unless otherwise indicated.

[2] The record includes "Factual Stipulations and List of Joint Exhibits" submitted by the parties. See Jt. Exh. 7.

Eastern Maine Processing & Distribution Facility (EMPD/facility), located at 16 Penobscot Meadow Drive, Hampden, Maine 0444-7097. The National Labor Relations Board (the Board) has jurisdiction over Respondent and this matter by virtue of Section 1209 of the Postal Reorganization Acta (PRA).

At all material times, Local 536 and the National APWU, AFL–CIO have each been labor organizations within the meaning of Section 2(5) of the Act.[3]

The following employees of Respondent (the Unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:[4]

> All employees as set forth in Article 1, entitled "'Union Recognition,'" of the National Agreement between American Postal Workers Union, AFL-CIO (the National Union) and Respondent.[5]

For at least several decades, the National Union has been and continues to be the designated collective-bargaining representative of the Unit. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which is the National Agreement, effective from September 21, 2018 through September 20, 2021.[6]

At all material times, the APWU, Local 536, AFL–CIO has been a member of the National Union and has been authorized to act as its designated agent for various purposes, including administering the 2018–2021 National Agreement with respect to employees employed by Respondent in the Unit who are employed at Respondent's EMPD facility.[7]

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Michael Mitchell (Mitchell) held the position of plant manager at Respondent's EMPD facility between July 1, 2020 and August 31, 2020 and for all material times has been a supervisor and agent of Respondent within the meaning of Section 2(11) and Section 2(13) of the Act.[8] Respondent's Labor Relations Specialist assigned to the National Union's grievances is Shannon Richardson (Richardson).[9] This case arises out of Respondent's use of an outside contractor to upgrade certain equipment, low-cost tray sorters (LCTS), in the EMPD facility in early July. This action was a part of Respondent's initiative to contract with

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[3] Local 536 is also known as the APWU Bangor Area Local 536.

[4] Jt. Exh. 8.

[5] Jt. Exh. 7, Factual Stipulation 4.

[6] Jt. Exh. 7, Factual Stipulation 5.

[7] Jt. Exh. 7, Factual Stipulation 6.

[8] Jt. Exh. 7, Factual Stipulation 3.

[9] Mitchell and Richardson were the only witnesses called by Respondent, with Mitchell also called by the General Counsel as an adverse witness.

a third-party to upgrade LCTS machines in 33 postal facilities throughout the country, including the EMPD facility.

1. Respondent's notice of nationwide implementation of the LCTS upgrades

By letter dated March 26, 2020, David Mills, Respondent's National acting manager of labor relations policy and programs from in Respondent's headquarters (HQ), notified Mark Dimondstein, National APWU president, that after considering relevant factors under Article 32 of the National agreement, Respondent would be contracting with a third-party to upgrade low-cost tray sorters (LCTS) in 33 postal facilities. Mills explained that the 200 LCTS machines deployed at various facilities over the last 20 years had reached or were reaching "end-of-life." He further related that the upgrade would require removal of out-of-date and non-supportable pneumatic tray pushers and replacement with electric tray pushers as well as upgrading existing computer and process control systems with associated system software, sortation programs and graphic packages. Mills concluded that significant impact to bargaining was not anticipated.[10] (R. Exh. 6) There is no evidence that Respondent or the National Union shared this notice or subsequent communications set forth below with Local 536.

2. National APWU request for information and grievance over LCTS upgrades

In response to Mills' March 26 letter, on April 6, the National Union's case officer, Terry Martinez (Martinez) requested a meeting regarding Respondent's announcement of its intent to hire a third-party contractor (Automated Control Technologies/"ACT") to upgrade the LCTS equipment. In addition, he requested that prior to the meeting, Respondent provide the National Union with the following information:

1. Identification of the 33 sites and the deployment schedule.
2. Copy of the contract for the above referenced work.
3. The USPS Article 32 analysis and supporting documentation relied upon.
4. The Statement of Work.
5. A description of the site preparation work if any.
6. A copy of all documents and information relied upon by the Postal [S]ervice prior to making its subcontracting determination, to include cost analyses.

(R. Exh. 1) In his April 14 response, Mills required that as a prerequisite for obtaining the requested information, Martinez "sign, date and return the enclosed Non-Disclosure Agreement (NDA)." (R. Exh. 2) By letter dated June 29, Mills provided the National Union with the requested information and explained that the NDA had been required for its release

[10] Mills sent the same notice to the presidents of the National Association of Letter Carriers, National Postal Mail Handlers' Union, United Postmasters and Managers of America and the National Association of Postal Supervisors. (R. Exh. 6).

"[d]ue to the nature of the documents requested and since some contain proprietary information." Mills enclosed the following documents:

- Request for Information dated April 6, 2020;
- Copy of Non-Disclosure Agreement (signed April 15, 2020);
- 33 sites and deployment schedule (subject to revision);
- Copy of contract for work (not redacted);
- Article 32 Memorandum of Due Consideration of Five (5) factors found in Article 32;
- LCTS At-Risk Analysis;
- Statement of Work (Included in the Article 32 Memorandum);
- Site prep work is determined and completed locally after the site survey;
- Cost Analysis – LCTS Upgrade Program.

(R. Exh. 3) On August 4, Respondent's manager, contract administration for the National APWU, Ricky Dean (Dean), acknowledged receipt of the National Union's Step 4 dispute (filed on July 14) which alleged:

> Whether the Postal Service violated Article 32 of the National Agreement, the Contracting or Insourcing of Contracted Service MOU and Article 19 to include Section 530 of the Administrative Support Manual [ASM] when it made its decision to subcontract with a third-party to upgrade [the] Low Cost Tray Sorter (LCTS) in 33 postal facilities. In addition, the Postal Service failed to meet with the Union or provide any document[s] prior to making its subcontracting decision.

(R. Exh. 5) Dean also advised that Richardson had been assigned as Respondent's representative in the Step 4 dispute. (Id.)[11]

B. APWU Local 536's July 8, 2020 Request for Information

At some time prior to July 7, Respondent notified EMPD facility employees, local craft unions, (including Local 536), the plant manager and safety office that a contractor, ACT, would be on the premises between July 7 and 17 to perform a "Computer/Hardware/Pusher/Electronics Replacement/Upgrade" on the facility's LCTS equipment. (Jnt. Exh. 3, p. 12) There is no dispute that the work began and ended within this time frame.

On July 8, Robert Perocchi (Perocchi) president, Local 536, requested the following information, through Mitchell, concerning the upgrade to the facility's LCTS:[12]

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[11] It is noted that a grievance at the national level or filed by the National Union is referred to as a "dispute." The hearing record shows that as of July and at least through the time of the hearing, the National Union's dispute with Respondent was pending arbitration. (GC Exh. 4)

[12] The General Counsel called Perocchi as its only witness on direct. He also served at the time as a Local 536 chief steward and maintenance craft director. (Tr. 13–14; GC Exh. 2)

> Please provide the following information for work that was contracted for the upgrade to the lowcost. 1) A copy of the contract. 2) A copy of the scope of work. 3) A copy of any and all cost comparisons and/or analyses. 4) A copy of the article 32 due consideration. 5) All information, documentation, records, data, correspondence, emails, etc. that was considered and used in the process to contract out this work. 6) A copy of the man-hours and labor cost. 7) The name of the postal official(s) who made the decision to contract out this work.

(Jt. Exh. 1(a)) On July 9, Mitchell responded in pertinent part as follows:

> That RFI consisted of a number of items that appear to be both overly broad and non-specific in nature, as well as matters not covered under the RFI process contemplated under terms of the National Agreement…
>
> My understanding of the union's right to access information as outlined in Articles 17 and 31 of the National Agreement extends only to making available for inspection that which exists and is in the possession of management – not to create that which does not/is not.
>
> Additionally, I would note Article 31.3b specifically states that RFIs 'relating purely to local matters should be submitted by the local Union representative to the installation head or designee. All other request[s] for information shall be directed by the National President of the Union to the Vice-President, Labor Relations.' As you know, the information requested in the RFI referenced above directly relates to a National Upgrade Project. That being the case, the Postal Service submits your RFI no longer relates to 'purely local matters," as outlined…but that it deals with a service wide National level initiative and is inappropriately advanced as a local RFI. Please direct your request for information through the process described in Article 31.3.

Jt. Exh. 1(b) Prior to sending his response, Mitchell consulted and received advise from Nate Jones (Jones), Respondent's State of Maine labor relations specialist, on how to respond. He told Jones how Perocchi's request "is so broad in the scope of information requested we cannot possibly fulfill the request…[t]he RFI is in relation to a National Upgrade project for all of the LCTS in the country. It started last year and continues through the end of this year. Our LCTS is being done this week." Jones responded within minutes that the matter was a "…national thing and not purely local, improperly filed, pound sand…" Jones included a

template response which Mitchell used to respond to Perocchi. (Tr. 85; GC Exh. 5, pp. 1, 3; Jt. Exh. 1(b)) Mitchell nor Jones indicated they were unable to furnish the information to Local 536 because the information did not exist or had to be created.

On July 14, Perocchi replied with Local 536's second request for information and claimed that Articles 17.1 and 31.3 require Respondent to "provide the information requested whether this is a national contract or not." Perocchi nevertheless asserted that it "is not a national contract" and asked Mitchell to "provide evidence to support your claim, a copy of the national contract." On the next day, Mitchell replied with a notation at the bottom of this second request: "[r]esponse already provided" on July 15. (Tr. 26–28; Jt. Exh. 2)

C. Local 536 Files a Local Grievance

Subsequently, on July 13, Perocchi filed a Step 1 grievance on behalf of Local 536 with Joel Greenleaf (Greenleaf), supervisor of maintenance operations at the EMPD alleging that management violated articles 19, 5 and 32 of the collective-bargaining agreement (CBA) when it "unilaterally" subcontracted out the LCTS upgrade, which was bargaining unit work, to outside contractors. The grievance further claimed that Respondent acted without giving Article 32 due consideration or consulting with or providing written notification to the Local Union. (Tr. 29–30; Jt. Exh. 3, pp. 10–11) Management denied this Step 1 grievance on July 19 as untimely since "APWU [had] been aware of this upgrade since 10/01/2019 via verbal communication and Notice of contractor on premises notification for LCTS upgrade survey dated 10/01/2019." Greenleaf asserted that "[e]mployees and APWU were made aware of the upcoming upgrade and was told at the time it was a Nat'l contract…Union had ample time, approximately 9 Months to object to this contracting of work, yet failed to protest." (Id.)

Perocchi filed Local 536's Step 2 appeal on July 22 with Step 2 designee, maintenance manager Deirdre Burns (Burns) which Respondent denied on August 13. (Jt. Exh. 3, pages 7–9, 13) He insisted that Local 536 filed its grievance in a timely manner as it received Respondent's "notification of contractor on premise for this upgrade on 07/17/20." He further asserted that Respondent did not provide the Local with written notification that the upgrade would actually be performed until June 19. He explained that Local 536 "first realized this was not a National contract on 7/8/2020" and filed his information request. Perocchi testified that after the August 4 Step 2 meeting with Burns, he learned that the National Union had not entered into such an agreement with Respondent on the outsourcing of the LCTS upgrades. (Jt. Exh. 3, p. 9) Instead, he found from documentation and discussion with the National Union that "there was a pending arbitration at the national level regarding this upgrade." (Tr. 35–37)

In her August 13 summary of her version of what they discussed during the August 4 Step 2 meeting, Burns essentially repeated much of the same reasons (untimely and a national matter) for denying the grievance. She denied the grievance at this level because, "[t]his is a National contract to upgrade the Low Cost Tray sorters across the country with the vendor, ACT," and that the "Article 32s for the National USPS Programs come directly from USPS Corporate Outsourcing on the HQ level." (Jt. Exh. 3, pp. 7–8) On August 16, Perocchi responded with "Step 2 Additions and Corrections." (Tr. 37–38) He reiterated Local 536's

position that the low-cost upgrade was "not under a National contract." He also claimed he told Burns that if management could provide proof that it was a part of a National contract or one not being appealed to arbitration, the local Union would withdraw its grievance. He explained that National busines agent, Dave Sarnacki (Sarnacki), related to him after August 4 that the upgrade was never subject to a National contract. He maintained that Local 536 had "mistakenly [taken] management's word that this was indeed a National contract and a settled matter at the National level." (Jt. Exh. 3, p. 6)

Perocchi filed Local 536's Step 3 grievance appeal on August 17. On September 10, Sarnacki acknowledged receipt of the Step 3 grievance. (Jt. Exh. 3, p. 4) Perocchi explained how the Local Union advances local grievances not resolved at either Steps 1 or 2 with the Union's national business agent and a national Postal Service representative.[13] Finally, by letter dated and signed October 30, Respondent's representative at the National level and Sarnacki, on behalf of the National APWU, confirmed an agreement that Local 536's grievance would be "held in abeyance pending the outcome of [the] National case." They did not mention Local 536's request for information nor did they indicate any issues with it or Local 536's grievance. (Jt. Exhs. 4 and 3, p. 6)

D. Relevant Portions of the National CBA Between Respondent and APWU Effective September 21, 2018 Through September 20, 2021

Article 15.2 Union-Management Cooperation states that "[a]ny employee who feels aggrieved must discuss the grievance with the employee's immediate supervisor within fourteen (14) days of the date on which the employee or the Union first learned or may have reasonably have been expected to have learned of its cause."

Article 31.3 (Union-Management Cooperation-Information) states in relevant part:

> The Employer will make available for inspection by the Union all relevant information necessary for collective bargaining or the enforcement, administration or interpretation of this Agreement, including information necessary to determine whether to file or to continue the processing of a grievance under this Agreement….
>
> Requests for information relating to purely local matters should be submitted by the Local Union representative to the installation head or his/her designee. All other requests for information shall be directed by the National President of the Union to the Vice President, Labor Relations.

[13] However, the national business agent will often call Perocchi "to discuss the local grievance prior to meeting on it to make sure he or she fully understands [it] and the contentions…if there is a payment as part of [a] remedy, they ask the Local to determine which craft employees and the amount of hours in which the grievants may be due." (Tr. 21-22)

> Nothing herein shall waive any rights the Union may have to obtain information under the National Labor Relations Act, as amended.

Article 32 regarding "Subcontracting" references Respondent's requirement to "give due consideration to public interest, cost, efficiency, availability of equipment, and qualification of employees when evaluating the need to subcontract." It also sets forth Respondent's responsibility to provide "advance notification to the Union at the National Level when subcontracting which will have a significant impact on bargaining unit work is being considered" and to "meet with the Union while developing the initial Comparative Analysis Report." Article 32 further requires Respondent to consider the Union's views on the matter as well as the Union's "proposals to avoid subcontracting and proposals to minimize the impact of any subcontracting." Article 32 makes clear that, "[n]o final decision on whether or not such work will be contracted out will be made until the matter is discussed with the Union." In addition, Respondent must notify the Local Union "[w]hen a decision has been made at the Field Level to subcontract bargaining unit work." (Jt. Exh. 5)[14]

E. Witness Testimony

1. Local 536's reasons for needing the request

Perocchi testified that he submitted the July information request to ensure that the required CBA Article 32 due consideration regarding the local EMPD LCTS upgrade had been completed. He sought information on the scope of work, man hours and labor costs associated with it, and all related documents related to determining whether the upgrade was actual bargaining unit work versus contracted out work. Perocchi testified that despite the grievance being held in abeyance, Local 536 still needed the requested information for discussions with the National Union in preparation for National grievance meetings and potential payout information that the National Union typically requested for settlement of local grievances or if it prevails. (Tr. 22–24, 40) Perocchi admitted that he had not asked the National Union for the information it requested about the local LCTS upgrade but reiterated that he "did not know for certain it was a National contract." (Tr. 48–50)

Richardson, Respondent's labor relations specialist assigned to the APWU contract, explained her understanding that Local 536 had (appropriately) been denied the requested information because it was a National matter.[15] (Tr. 57–58; R. Exh. 5) Richardson admitted however that the National Union's request for information did not exactly mirror that of the Local's and that the NDA signed by the National Union limited with whom it could share information. (Tr. 74–75) The General Counsel pointed out through its cross-examination of Richardson that Article 17.3 of the CBA permits a steward to request and have access to review information not only necessary for processing a grievance but also to determine if a grievance is warranted. (Tr. 81–83) (Tr.

[14] Article 32 is referenced here as background information.

[15] As Respondent's representative on the National Union's grievance advanced to Step 4, Richardson gathered and provided the information requested by the National Union. (Tr. 57–58; R. Exh. 5)

77–79; Jt. Exh. 5) Richardson testified that national grievances take precedence over local ones and if Respondent prevailed at the national level, it would dispose of any local subcontracting disputes. (Tr. 71–72, 82–83)

Mitchell confirmed his reasons for denying Local 536's information request on June 9. It is interesting, however, that when asked if a contract covering the work performed at the EMPD facility existed on July 8, he responded that "I assume so. I don't know that for a fact…as far as I know it was a National contract from the very beginning." (Tr. 88–91)

2. Credibility findings

As previously stated, Local 539 believed that the upgrade of the EMPD facility's LCTS was a local matter since it occurred locally, potentially affected the Local Unit and had not been part of an agreement between Respondent and the National Union to perform the work or have the upgrade contracted out to a third party. Similarly, Perocchi insisted that he timely filed the Local's grievance on July 8 when he discovered that there was a pending arbitration rather than a national agreement for the work. Mitchell and Richardson on the other hand justified Respondent's refusal to provide the requested information because it related to Respondent's own national initiative to upgrade the LCTS machines in 33 facilities nationwide and therefore was not a purely local matter.

First, I find that both Perocchi and Respondent's witnesses are credible regarding their own beliefs and interpretations. Perocchi admitted that Burns had told him on a few occasions prior to the LCTS machine upgrade at the EMPD facility that it would possibly take place. (Tr. 46) On cross-examination, Perocchi insisted that "[i]t's been my experience that I don't believe it until I see it…We're told a lot of things could or may happen and they don't actually happen, so until something actually takes place, I take everything with a grain of salt." (Tr. 46–47) In addition, the evidence reveals that Respondent had provided the Local Union and facility with an earlier notice that a contractor would be on the premises on October 1, 2019, to perform a survey regarding the potential upgrade. However, Respondent did not provide notice at that time as to if and when the actual EMPD facility upgrade would be performed.

On direct, when asked "When did you learn that the upgrade work had been performed," Perocchi responded, "The week they showed up to perform the upgrade…I believe it was the July 4th week." Tr. 23–24. He also acknowledged his affidavit statement which I find was consistent with his testimony, that, "I had been told by the Employer months before their intention to do the upgrade, but I didn't know the date of the upgrade until about a month before the work took place." His testimony also concurred with his affidavit statement, that "[m]anagement told me from the beginning that the upgrade work was under a National contract; however, I learned after the work had been completed from business agent—National business agent Dave Sarnacki that he was not aware of any National contract for upgrade work." (Tr. 47–48) I find that Respondent's Counsel's attempt to impeach Perocchi with his affidavit testimony fails. Respondent's Counsel mischaracterized Perocchi's direct testimony when he asked him if he had "previously

testified that [he] just learned of the upgrade to the low cost when it was performed." (Tr. 46–47) Rather, Perocchi consistently maintained in his testimony and affidavit statement that he first discovered that the upgrade work had been performed "[t]he week they [ACT] showed up to perform the upgrade." (Tr. 23–24)

I find that Perocchi certainly knew about Respondent's plan to upgrade the facility's LCTS machine.[16] However, I credit his testimony that he did not know when Respondent planned to actually make the upgrade.[17] The outside contractor ACT actually upgraded the local facility's LCTS equipment at some time between July 7 and 17, 2020, the same time frame during which Local 536 served its information request and filed its local grievance.[18] (Tr. 23) Whether mistaken or not, I find Perocchi's (and Local 536's) view that the EMPD facility upgrade constituted a local matter reasonable and believable. Local 536's information request and subsequent grievance only related to the local facility's LCTS upgrade and there was no evidence to contradict the Local's belief that management had led Perocchi to believe there had been some kind of agreement between the parties regarding the upgrade. As previously discussed, even Mitchell indicated his belief that, "as far as I know it was a National contract from the very beginning." (Tr. 88–91) Perocchi testified that prior to making the information request, he discovered that such an agreement did not exist, and after the Step 2 meeting, learned of the National Union's pending arbitration. There is no evidence that Local 536 had been privy to Respondent's March 26 notice of intent to the National Union or to the National Union's subsequent information request concerning the LCTS upgrades.

Nevertheless, my decision as to whether Respondent violated the Act when it failed to furnish Local 536 with the information requested on July 8 does not turn on the fact that the National Union did not agree to Respondent's LCTS upgrades.

III. LEGAL ANALYSIS

A. Respondent's Request that this Case be Deferred to the Grievance Arbitration Procedure is Denied

Respondent's contention that this matter should be deferred to arbitration is without legal support. Not only is the Board not required under the Act to defer request for information cases to arbitration, but it "has long adhered to a policy of refusing to defer" such disputes to arbitration. *DaimlerChrysler Corp. v. NLRB*, 288 F.3d 434, 444 (D.C. Cir. 2002); *Mt. Sinai Hospital*, 331 NLRB 895 (2000); *Postal Service*, 302 NLRB 918, 918 (1991)

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[16] See Notice of Contractor on Premises notifying Local 536 that contractor ACT would be performing a survey in the EMPD facility for the LCTS upgrade on October 3, 2019. (Jt. Exh. 3, p. 13)

[17] In crediting Perocchi's, I also believe his testimony that at times, Respondent had not followed through on its plans to make changes or upgrades within the facility. Further, there is no evidence that the National Union notified Local 536 of or shared Respondent's March 26, 2020 notice or that the National Union communicated to Local 536 that it had filed a national grievance or made its own information request. R. Exhs. 1, 6)

[18] See Notice of Contractor on Premises notifying Local 536 that ACT would be on the EMPDC premises between July 7 and 17 to perform "Computer/Hardware/Pusher/Electronics Replacement/Upgrade" on the EMPDC LCTS. (Jt. Exh. 3, p. 12)

Therefore, I find that deferral of this matter in inappropriate. *Poudre Valley Rural Elec. Ass'n, Inc. & Int'l Bhd. Of Elec. Workers, Loc. 111, AFL–CIO*, 366 NLRB No. 21 (2018).

B. Legal Standards Regarding Requests for Information

An employer's duty to bargain includes a general duty to provide information requested by the union that "is potentially relevant and would be of use to the union in fulfilling its responsibilities as the employees' bargaining representative."[19] *NLRB v. Truitt, Mfg. Co.*, 351 U.S. 149 (1956); *E.I. DuPont de Nemours and Co*., 366 NLRB No. 178, slip op. at 4 (2018), citing *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436, 438 (1967); *United Parcel Service of America*, 362 NLRB 160, 161–162 (2015); *Postal Service*, 332 NLRB 635, 635 (2000). Generally, information relating to wages, hours, and terms and conditions of employment of unit employees is presumptively relevant and must be furnished to the union upon request unless the employer provides a legitimate reason for not doing so. *CVS Albany, LLC,* 364 NLRB No. 122, slip op. at 2 (2016) (not reported in Board volumes); *Matthews Readymix, Inc*., 324 NLRB 1005, 1009 (1997), enf. denied on other grounds 165 F.3d 74 (D.C. Cir. 1999); *Southern California Gas Co.*, 344 NLRB 231, 235 (2005); *Curtis-Wright Corp.*, 145 NLRB 152 (1963), enfd. 347 F.2d 61 (3d Cir. 1965). Further, information involving any stage of arbitration is relevant and should be provided as the goal is to also encourage resolution of disputes short of arbitration hearings. *Pennsylvania Power Co.*, 301 NLRB 1104, 1105 (1991). Thus, the employer must furnish documentation relating to the union representative's core responsibilities of processing grievances and arbitrations, enforcing compliance of existing CBAs and representing employees in the disciplinary process.

When requested information involves employees outside of the bargaining unit, it is the union's burden to demonstrate relevance. *United States Testing*, 324 NLRB 854, 859 (1997), enfd. 160 F.3d 14 (D.C. Cir. 1998); *Reiss Viking*, 312 NLRB 622, 625 (1993) *Shoppers Food Warehouse*, 315 NLRB 258, 259 (1994). This burden is "not exceptionally heavy," as "the Board uses a "liberal, discovery-type standard" in determining relevancy, with the sought-after information not having to be dispositive of the issue between the parties. *NLRB v. Acme Industrial Co.*, 385 U.S. at 437; *G4S Secure Solutions (USA), Inc.*, 369 NLRB No. 7, slip op. at 2 (2020); *DirectSat USA, LLC,* 366 NLRB No. 40, slip op. 1, fn. 2 (2018). Rather, it must have some bearing upon the matter, be of probable or potential use to the union in carrying out its statutory responsibilities and be more than a mere suspicion. *Postal Service*, 332 NLRB 635 at 636 ; *Shoppers Food Warehouse*, *Corp*., 315 NLRB 258, 259 (1994); *Bacardi Corp.*, 296 NLRB 1220 (1989). In other words, a union must have "a reasonable belief supported by objective evidence that the requested information is relevant, unless the relevance of the information should have been apparent to the Respondent under the circumstances*." Public Service Co. of New Mexico*, above at 574. See also *Disneyland Park*, 350 NLRB 1256, 1258 (2007); *Shoppers Food Warehouse*, 315 NLRB at 259.

[19] Sec. 8(a)(5) of the Act provides that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of its employees." 29 U.S.C. § 158(a)(5).

However, the Board does not assess the merits of the underlying grievance or dispute between the parties to determine relevance. *Postal Services*, 332 NLRB 635 at 635.

Once a union has established relevancy, an employer must show that the information is not relevant, does not exist or otherwise cannot be furnished. See *KOIN-TV*, 370 NLRB No. 68, slip op. at 10 (2021).

C. Respondent Violated Section 8(a)(5) and (1) of the Act by Failing and Refusing to Provide the Union with Information Requested on July 8, 2020 and July 14, 2020

I find that Respondent violated Section 8(a)(5) and (1) of the Act by failing to provide Local 536 with the requested information regarding the upgrade of the LCTS equipment in the EMPD facility. First, the record supports a finding of relevancy. The request concerned the subcontracting of the upgrade work only in in the EMPD facility to determine who exactly performed the work and what Article 32 factors Respondent considered. In other words, Local 536 exercised its duty to determine if the subcontracted work violated any of the CBA provisions. Moreover, Perocchi filed a grievance pertaining only to the local EMPD facility's upgrade. Thus, the General Counsel has established, despite the grievance being held in abeyance, that the information request was reasonable, necessary and relevant to Local 536's local representational duties. See *Sho-Me Power Elec. Coop. & Int'l Bhd. Of Elec. Workers, Loc. 53*, 360 NLRB 349 (2014) (The Board agreed with the administrative law judge's finding that the information was relevant to a pending grievance arbitration and the union's responsibility to determine whether respondent was complying with the contracting provisions set forth in the CBA.)

In this case, where the requested information involves contract employees outside the bargaining unit, it becomes the Union's burden to demonstrate relevance. As stated above, the Union's burden is "not exceptionally heavy" and requires application of only a "liberal, discovery-type standard." *NLRB v. Acme Industrial Co.*, above; *G4S Secure Solutions (USA), Inc.,* above. I find the information requested by Local 536 clearly has a bearing on the matter of subcontracting the work out to a third party. Surely Respondent believed it to be relevant to the subcontracting out of upgrade work since it provided similar (but not the exact same) information to the National Union.

In Perocchi's second request for the same information, he challenged Mitchell's refusal to provide the information because the upgrades were part of a national initiative and not purely local. In doing so, he articulated Local 536's position that the nature of the EMPD facility LCTS upgrade work was not subject to a national contract or agreement between Respondent and the National APWU. Mitchell never supplied the requested information or addressed Perocchi's questions in the second request. (Jt. Exhs. 1(a), 1(b), 2)

I agree with the General Counsel that Mitchell's additional responses on July 9 were problematic. First, Mitchell failed to explain what he meant by his statement that "[m]y understanding of the union's right to access information as outlined in Article 17 and 31…extends only to making available for inspection that which exists and is in the possession of management—not to create that which does not/is not." He certainly did not articulate

what information was nonexistent or which Respondent needed to create. In fact, when he sought Davis' advice on July 9, neither Mitchell nor Davis indicated that Local 536's requested information was not available. Based on the record, the information clearly existed since Respondent eventually fulfilled the National Union's request. Mitchell also failed to explain why he believed the requested information was "both overly broad and non-specific in nature." To the contrary, I find Local 536's request was straight forward and specific. (Jt. Exh. 1(b))

The parties dispute whether Article 31.3 of the CBA precludes the Local Union from requesting and receiving information about local work that may be a part of a national contract or national initiative. There is no doubt, however, that Article 31, Section 3 of the National Agreement requires the employer to make available for inspection by the Union all relevant information necessary for enforcement, administration and/or interpretation of the agreement. This section specifically includes "information necessary to determine whether to file or to continue the processing of a grievance." (Jt. Exh. 3, p. 129) Article 31.3 does state that, "[r]equests for information relating to purely local matters should be submitted by the Local Union representative to the installation head or his/her designee. All other requests for information shall be directed by the National President of the Union to the Vice President of Labor Relations." It also states that, "Nothing herein shall waive any rights the Union may have to obtain information under the Act."[20] (Id.) However, Local 536 did not request information pertaining to any other facility. Nevertheless, Board law does not require the information request to be dispositive of the underlying issues between the parties and does not support the deferral of information requests to arbitration.

I further conclude that the agreement between Respondent and the National Union to hold the Local's grievance in abeyance pending the national arbitration does not relieve Respondent of its duty to comply with Local 536's request. The very fact that it is being held in abeyance and not dismissed belies a finding that the information is not relevant or that Local 536 is not entitled to it. Moreover, I credit Perocchi's uncontroverted testimony that Local 536 would still need the information to determine if it would proceed with its local grievance and to provide necessary wage and hour information for local unit employees if the National Union prevails at arbitration. The sought after information in this case, even at this stage, has some bearing on the matter of the local LCTS upgrade and is of probable or potential use to Local 536 in carrying out its statutory responsibilities. See *Postal Service*, 332 NLRB 635 at 636. Therefore, it remains relevant and necessary to Local 536.

D. Respondent's Defenses Fail

I find that Respondent has not met its burden to establish that the information "is not relevant, does not exist, or [for] some other valid and acceptable reason could not be furnished." *Nexstar Broadcasting, Inc. d/b/a KOIN-TV*, 370 NLRB No. 68, slip op. at 10 (2021). First, Respondent's argument that it would be inappropriate for it to furnish Local

[20] The parties' Joint Contract Interpretation Manual between Respondent and the APWU, dated December 2020, does not provide additional guidance regarding the interpretation of Article 31.3. Nor does it distinguish between purely local and national matters. (Jt. Exh. 6, pp. 110–111)

536 with the same information already provided to the National Union fails. The evidence shows that in comparison, Local 536's July 8 information request overlaps with but does not include at least three items not contained in the National Union's request. The National Union did not request "[a] copy of the scope of work," "[a] copy of the man-hours and labor cost" or "[t]he name of the postal official(s) who made the decision to contract out this work."[21] (Jt. Exh. 1(a), R. Exh. 1) Moreover, the NDA restricted with whom the National Union could share the information sought. Therefore, I reject Respondent's contention that Local 536 could have or should have received all of the information requested on July 8 from the National Union. (Tr. 75; R. Exhs. 2–3)

Moreover, Board law does not support this argument. Rather, the Board upheld an administrative law judge finding that the Postal Service had violated the Act when it directed a local union to request or wait for information from a national union. *Postal Service*, 365 NLRB No. 51, slip op. at 6-8 (2017), citing *NACCO Material Handling Group*, 359 NLRB No. 139 (2013) (Board upheld administrative law judge finding that the employer's requirement that the union seek information from another party did not relieve it from its duty to provide the union with relevant and necessary information) and *Holyoke Water Power Co.*, 273 NLRB 1369 (1985) (Board held "…the availability of information from another source does not alter a party's duty to provide relevant and necessary information that is readily available."). In this case, there is no evidence that the requested information did not exist or was otherwise unavailable. In fact, Respondent had provided similar information to the National Union on June 29. As the General Counsel points out, Respondent is mistaken in its contention that providing information to the National Union about the upgrades throughout the country satisfied its duty to furnish local LCTS upgrade information to Local 536.

Further, Respondent asserts that Local 531's information request relates to a national test that, per Article 34 of the CBA can only be grieved at the national level. (GC Exh. 1(e)) First, there is no evidence that the LCTS upgrade work locally or nationally constituted a national test under Article 34.[22] Richardson testified that she was not aware of any connection between the subcontracting of the LCTS machine upgrades and work measurement systems or worker time standards. Finally, Respondent did not include this as a reason for not providing the information in its July 9 response. (Tr. 80; Jt. Exh. 5, pp. 134–135)

Next, Respondent's assertion that the "APWU" waived its right to bargain over how and to whom requests for information should be submitted under the "contract coverage" standard adopted by the Board in *MV Transportation, Inc.*, 368 NLRB No. 66 (2019) is misplaced. In fact, it appears that Respondent is attempting to have the Board expand its contract coverage standard to information request cases. There is simply no basis for expansion of this standard to these types of cases. In *MV Transportation, Inc.*, above, the Board applied the contract coverage standard in cases alleging unilateral change. As the General Counsel pointed out, the Board specifically declared that "[w]e solely address[es]

[21] Arguably, a copy of the scope of work might have been equivalent to the National Union's request for "The Statemen of Work," but the National Union did not request the other two items. (R. Exhs. 2–3)

[22] Article 34 specifically deals with Respondent's agreement that "any work measurement systems or time or work standards" be "fair, reasonable and equitable."

those cases in which an employer defends against an 8(a)(5) unilateral-change allegation by asserting that contractual language privileged it to make the disputed change without further bargaining." *MV Transportation, Inc.*, above, at 11.

Since the Board chose not to extend the "contract coverage" beyond allegations of unilateral change, and specifically precludes sending information cases to arbitration, I will evaluate Respondent's assertion (in its opening statement) that Local 536 had waived its right to request information in this case under the "clear and unmistakable standard.[23] Under this standard, Respondent, who asserts this waiver, has the burden to establish that such a waiver by Local 536 was intended. *Leland Stanford Junior University*, 307 NLRB 75, 80 (1992), enfd. 715 F.2d 473 (9th Cir. 1983). Here, Respondent has not provided evidence that Local 536 or the National Union has waived its right to bargain over or request information necessary to fulfill its bargaining responsibility to the Unit. As previously discussed, the CBA entitles the Local Union as the Local designee to "[i]nformation relied on by [it] to support [its position] in a grievance." Despite language instructing that grievances on matters other than "purely local" ones be brought by the National Union, the parties followed with the disclaimer that "[n]othing herein shall waive any rights the Union may have to information under the [Act]." (Jt. Exh. 3, p. 56)

Finally, I find that Respondent's argument that the Board does not have jurisdiction to interpret and apply CBA terms is also misplaced as is its reliance on *Litton Financial Printing*, 501 U.S. 190 (1991) in support thereof. In *Litton Financial Printing*, the Supreme Court held that the unilateral change doctrine was not extended to impose a statutory duty to arbitrate post-expiration disputes and that a layoff dispute at issue did not arise under the CBA. It is true that the Supreme Court determined that "arbitrators and courts, rather than Board, are principal sources of contract interpretation under the Labor Management Act[24] but the Court also recognized that the Board does "[have] occasion to interpret collective-bargaining agreements in the context of unfair labor practice jurisdiction. *Litton Financial Printing*, above at 202–203, citing *NLRB v. C & C Plywood Corp*., 385 U.S. 421 (1967). I find that Local 539's allegation here is one of those occasions as the parties' CBA Article 31.3 provision that "[n]othing herein shall waive any rights the Union may have to information under the [Act]" squarely places this matter before the Board to determine if the Local and National Unions in this case have waived any rights they may have to information under the Act. As stated, I find that they have not.

CONCLUSIONS OF LAW

1. Respondent United States Postal Service is an employer in this matter over which the National Labor Relations Board has jurisdiction by virtue of Section 1209 of the Postal Reorganization Act (PRA).

[23] The Board had an opportunity, but did not, expand its "contract coverage" standard in *McLaren Macomb*, above, in which this administrative judge applied the "clear and mistakable waiver" standard in determining that the respondent violated the Act. *McLaren Macomb*, above, at 6 (2020) citing *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983).

[24] Section 1 et seq., as amended, 29 U.S.C.A. Section 151 et seq.

2. The National American Postal Workers Union (APWU), AFL-CIO and the APWU Local Union No. 536 have been labor organizations within the meaning of Section 2(5) of the Act.

3. By failing and refusing to furnish to the APWU Local 536 the relevant and necessary information requested in its July 8, 2020 request, Respondent has violated Section 8(a)(5) and (1) of the Act.

4. The unfair labor practices described above have affected commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, Respondent shall cease and desist from refusing to bargain collectively and in good faith with the APWU Local 536 by failing and refusing to provide it with the relevant and necessary information requested on July 8, 2020. Therefore, Respondent shall promptly and completely furnish the APWU Local 536 with all the information requested in its July 8, 2020 request.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[25]

ORDER

The Respondent, United States Postal Service, Hamden, Maine, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with APWU Local 536 as the authorized designated agent by the National APWU to represent the Unit at the Eastern Maine Processing and Distribution (EMPD) Facility by failing and refusing to furnish it with information requested on July 8, 2020.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Furnish to the APWU Local 536 promptly and completely all information requested in its July 8, 2020 request for information.

[25] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Within 14 days after service by the Region, post at its EMPD facility in Hampden, Maine copies of the attached notice marked "Appendix."[26] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 8, 2020.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 17, 2021

Donna N. Dawson
Administrative Law Judge

[26] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID–19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if Respondent customarily communicates with its employees by electronic means. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively with APWU Local 536 as the authorized designated agent by the National APWU to represent the Unit at the Eastern Maine Processing and Distribution (EMPD) Facility by failing and refusing to furnish it with information requested on July 8, 2020.

WE WILL furnish to the APWU Local 536 promptly and completely all information requested in its July 8, 2020 request for information.

UNITED STATES POSTAL SERVICE
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

10 Causeway Street, Room 601
Boston, MA 02222-1001
(617) 565-6700 Hours: 8:30 a.m. to 5 p.m. (ET)

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/01-CA-263580 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (617) 565-6700.